Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 1626

LAS VEGAS SUN, INC., A Nevada Corporation,

Petitioner,

vs.

SUMMA CORPORATION, dba CASTAWAYS CASINO, FRONTIER HOTEL, and DESERT INN HOTEL; HOTEL PROPERTIES, INC., dba LANDMARK HOTEL; HUGHES TELEVISION NETWORK, INC., dba SANDS HOTEL; FIRST NATIONAL BANK OF NEVADA, dba SILVER SLIPPER; FRANK W. GAY; and CHESTER DAVIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

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May 19, 1980.

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SUBJECT INDEX

Page

Jurisdiction 2

Statement of the Case 2

Reasons Why the Writ Should Be Denied 4

I.

All of the Reasons Stated in the Corporate Respondents' Brief 4

II.

Certiorari Is Unwarranted on Any Issue as to the Individual Respondents 4

Conclusion 5

TABLE OF AUTHORITIES CITED

Rules

Rules of Supreme Court of the United States, Rule 22(3) 2, 5

Rules of the Supreme Court of the United States, Rule 23(e) 2

Statutes

Clayton Act, Sec. 8 (15 U.S.C. §19) 3

Sherman Act, Sec. 1 (15 U.S.C. §1) 4

United States Code, Title 28, Sec. 2101(c) 2, 5

Textbook

Stern & Gressman, Supreme Court Practice, p. 389 (5th ed. 1976) 5

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Respondents.

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

Respondents Frank W. Gay ("Gay") and Chester C. Davis ("Davis") respectfully request that this Court deny the petition for a writ of certiorari, seeking review of certain portions of the opinion (reported at 610 F.2d 614 and attached to the petition) and judgment of the United States Court of Appeals for the Ninth Circuit in this case, not only for the reasons ably stated in the brief in opposition submitted by the other, corporate respondents, but also for the further reasons stated hereinafter which are applicable to Gay and Davis (hereinafter sometimes referred to collectively as the "individual respondents").

Jurisdiction

As noted in the petition, the judgment of the Court of Appeals was entered on November 15, 1979. Although a petition for rehearing was apparently filed below by petitioner, it was neither (i) served upon the individual respondents or their counsel, nor (ii) addressed to any issue involving either individual respondent. Accordingly, the petition is untimely as to the individual respondents. 28 U.S.C. § 2101(c); Supreme Court Rule 22(3).

Statement of the Case

By presenting contentions and facts which are not material to the questions it seeks to present for consideration by its petition, petitioner's statement disregards both Supreme Court Rule 23(e) and the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing parties below, and that all reasonable inference of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment entered below. Individual respondents instead adopt the Statement of the Case contained in the contemporaneous opposition brief being submitted on behalf of the corporate respondents, adding only a few matters which are peculiarly applicable to the position of Gay and Davis.

While the individual respondents were, at all times pertinent to the complaint, directors of corporate respondents Summa Corporation, Hotel Properties, Inc. and Hughes Television Network, Inc., as well as Summa's chief executive officer and general counsel, respectively, both severed all connections with those corporate entities more than a year ago. Both continue to be represented by counsel who formerly also represented the corporate respondents as well, but the other respondents have been separately represented by different attorneys since shortly prior to the oral appellate

argument below. More importantly, the individual respondents were not charged by petitioner's pleadings below with any Sherman Act violation; both were additional defendants only to one count allegedly based upon Section 8 of the Clayton Act (15 U.S.C. § 19) and two counts alleging common law tort.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

All of the Reasons Stated in the Corporate Respondents' Brief

To the extent that the individual respondents are deemed to have standing herein to so do, they adopt and incorporate all of the reasons stated in the corresponding section of the brief in opposition contemporaneously submitted on behalf of the corporate respondents.

II.

Certiorari Is Unwarranted on Any Issue as to the Individual Respondents

The petition seeks to address only questions pertaining to Sherman Act Section 1 (15 U.S.C. § 1). See Petition, pp. 2-3 (Statutes Involved; Questions Presented for Review). The sole applicability of that statute, and any questions thereunder, to this action is to the first count of the amended complaint below, regarding which neither Gay nor Davis was named or charged as a defendant. Moreover, neither of the individual respondents has any substantive or even academic interest in the questions raised in the petition. Originally named and sued by petitioner below (on other-than-Sherman-Act grounds) as directors or officers of the corporate respondents, neither has any present association with any other party. Accordingly, the petition is completely moot as to both individual respondents.

The omission or failure below by petitioner even to serve the individual respondents with a copy of the petition for rehearing of the opinion and judgment of the Ninth Circuit, which sought to reargue below essentially the same issues raised in the petition for certiorari, is both a tacit admission

that there remains no justiciable issue as between petitioner and the individual respondents, and a jurisdictional flaw. Inasmuch as the appellate court's judgment became final as to the individual respondents in November (see Rule 36, Federal Rules of Appellate Procedure), the petition, filed approximately five months later in April, is untimely as to these respondents. See Supreme Court Rule 22(3) and 28 U.S.C. § 2101(c) (petition must be applied for within 90 days from entry of judgment); *Stern & Gressman, Supreme Court Practice* 389 (5th ed. 1976) and cases cited thereat (untimeliness is a jurisdictional defect). Under such circumstances, Gay and Davis are clearly entitled to be relieved from any need to participate further as parties in this action.

Conclusion

For all the foregoing reasons, the petition should be denied; and in the event the Court should see fit to grant the petition and examine further the questions presented, the petition should nevertheless be denied as between the petitioner and the individual respondents.

Respectfully submitted,

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